Supreme Court, U. S.
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DEC 1 1974
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IN THE

Supreme Court of the United States

No. 73-1177

C. MURRAY HENDERSON, Warden
LOUISIANA STATE PENITENTIARY,
Petitioner,

versus

FRANK RECASNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

LEROY A. HARTLEY
Special Counsel to the
Attorney General
State of Louisiana

JIM GARRISON
District Attorney
Parish of Orleans

LOUISE KORNS
Assistant District Attorney
Parish of Orleans

104 Supreme Court Building
301 Loyola Avenue
New Orleans, La. 70112
(504) 527-8468

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REPORT OF PROCEEDINGS BELOW

Recasner v. Henderson, No. 73-2527 on the docket of the United States Court of Appeals for the Fifth Circuit, decided October 19, 1973 (see appendix — no opinion).

Recasner v. Henderson, No. 73-724 on the docket of the United States District Court, Eastern District of Louisiana, decided May 21, 1973 (see appendix for opinion).

JURISDICTIONAL GROUNDS

The Fifth Circuit Court of Appeals handed down its decision in this Habeas Corpus case, affirming the District Court judgment, on October 19, 1973.

The Fifth Circuit Court of Appeals refused a rehearing in this case on November 30, 1973.

The statutory provisions relied on to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 and 28 U.S.C. 2101.

QUESTIONS FOR REVIEW

Whether before accepting a plea of guilty a State court judge must specifically advise the accused of his right to trial by jury, his right to remain silent, his right to face his accusers, and his right to appeal.

STATEMENT OF THE CASE

Early in 1969 Frank Recasner and two friends held up Louie's Green Room at 400 North Galvez Street, New Orleans, in the early hours of the morning. The robbers were seen in the act of disguising themselves in preparation for the crime by two departing patrons, who promptly summoned the police. Within minutes the place was surrounded. Recasner and one Lumkins were captured inside "red handed", after a shoot-out between Recasner and a police officer. The third robber, Woodfox, removed his disguise and eluded capture

by posing as a customer, but was later captured, tried, convicted, and sentenced to 50 years in the Louisiana State Penitentiary.

The District Attorney for the Parish of Orleans filed two bills of information charging Recasner with three armed robberies growing out of this incident.

On June 18, 1969, (a few days after *Boykin* was decided), Recasner, while represented by counsel, pleaded guilty to the three armed robbery charges and was sentenced to thirty years at hard labor for each crime, the three sentences to run concurrently.

At the time Recasner pleaded guilty before the Honorable Matthew Braniff, Judge of Section B of the Criminal District Court for the Parish of Orleans, the following occurred:

> By the Court:
> In case No. 208-140, Frank Recasner, there are two counts of armed robbery.
>
> By Mrs. June B. Cahn: (Attorney for the defendant)
> We plead guilty your honor to each count.
>
> By the Court:
> Now, Frank Recasner, you have entered pleas of guilty to two counts of armed robbery here.
>
> By Frank Recasner:
> Yes.

By the Court:
You are aware of the seriousness of these crimes, are you not?

By Frank Recasner:
Yes sir.

By the Court:
You are aware that by pleading guilty, you will not be given a trial?

By Frank Recasner:
Yes Sir.

By the Court:
You waive your right to a trial, and you also waive your right to an appeal as a result of that?

By Frank Recasner:
Yes.

By the Court:
Has anybody promised you anything, or made threats, or used any coercion to get you to enter this plea?

By Frank Recasner:
No sir.

By the Court:
Very well, let the pleas be recorded.

Approximately four years later, on March 22, 1973, Frank Recasner filed a petition in the United States District Court for the Eastern District of Louisiana, alleging that his plea was accepted in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969).

The United States District Court granted the Writ of Habeas Corpus on the ground that there was no showing, either in the Louisiana court transcript or otherwise, that prior to pleading guilty Recasner was advised by the trial judge or anyone else of 1) his right to trial by jury, 2) his right to remain silent, 3) his right to face his accusers, and 4) his right to appeal. The Fifth Circuit Court of Appeals affirmed without reasons. See Appendix.

ARGUMENT

The State of Louisiana is of the respectful view that in the instant case the Fifth Circuit Court of Appeals has interpreted *Boykin v. Alabama*, 395 U.S. 238 (1969), much more strictly and technically than the *Boykin* opinion itself warrants. For a correct interpretation, *Boykin* must be read with *McCarthy v. United States*, 394 U.S. 459 (1969), and Rule 11 of the Federal Rules of Criminal Procedure.

Although this Court states in its opinion in *Boykin* that several federal constitutional rights are waived when a plea of guilty is entered in a State court — among them the privilege against self-incrimination, the right to trial by jury, and the right to confront

one's accusers — nowhere does the *Boykin* decision say that an accused who pleads guilty must specifically and serially waive each of these rights in turn. In this connection it should be observed that the same rights against self-incrimination, etc., are mentioned in *McCarthy v. United States*, supra, which holds only that if the record in the Federal District Court at the time an accused pleads guilty shows *noncompliance with Rule 11 of the Federal Rules of Criminal Procedure*, the guilty plea must be set aside.

Rule 11 of the Federal Rules of Criminal Procedure simply provides 1) that the court shall not accept a plea of guilty without first addressing the accused personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea; and 2) that the court shall not enter a judgment upon a plea of guilty unless the court is satisfied that there is a factual basis for the plea.

The most that can be said of *Boykin v. Alabama*, supra, is that it made Rule 11 applicable to the States. See dissent of Harlan, J., in *Boykin*.

Certainly this Court did not in *Boykin* intend to apply a stricter rule to the several States than to the Federal Government.

Thus, in Louisiana's respectful belief, all that *Boykin* requires is that the State Court record affirmatively show 1) that before accepting the plea of guilty the

trial judge addressed the accused personally and determined that the plea was being made voluntarily, with an understanding of the nature of the charge and the consequences of the plea; and 2) that the trial court was satisfied that there was a factual basis for the plea. Rule 11 does not require that an accused must explicitly waive his right to a jury trial, his privilege against self-incrimination, his right to confront his accusers, or his right to appeal from the guilty plea.

Pertinently, in footnote 20 in *McCarthy*, at 394 U.S. 467-468, this Court explains why it will not set out exactly what procedure must be followed at the time of the guilty plea to satisfy Rule 11.

> "The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and therefore, *we do not establish any general guidelines other than those expressed in the Rule itself.* As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. In all such inquiries '[m]*atters of reality, and not mere ritual,* should be controlling.' *Kennedy v. United States*, 397 F.2d 16, 17 (C.A. 6th Circ. 1968)."
> (Emphasis ours)

In *United States v. Frontero,* 452 F.2d 406 (1971), the Fifth Circuit Court of Appeals, through Wisdom, J., made the following pertinent observations: (at 452 F.2d 415)

> "Kelly argues that he was not informed of the constitutional rights waived as a consequence of his guilty plea. The colloquy between Kelly and the district judge reveals the fact that Kelly was informed that his plea constituted a waiver of his right to a jury trial. This, Kelly argues, was not enough. He claims that he should have been informed that his plea constituted a waiver of his right to confront his accusers and his privilege against compulsory self-incrimination. This Court is, however, aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence', within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted. Carrying Kelly's argument to its logical conclusion, the court, before accepting a guilty plea, would be required to inform a defendant of his right to a speedy and public trial, his right to an impartial jury, his right to compulsory process for obtaining witnesses, his right to be free from cruel and unusual punishment, his right to be free from unreasonable

> searches and seizures, his right to have excluded from the trial any evidence illegally seized, and many more. We do not read Rule 11 as requiring this; nor do we feel that due process requires this. Kelly relies heavily, in fact solely, on Boykin v. Alabama, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, as authority for this contention. This reliance is misplaced. *Boykin* involved a silent record, where there was absolutely no showing that the guilty plea was intelligently and voluntarily entered. The record in the case at bar reveals affirmative awareness of the 'consequences' of a guilty plea."

In the instant proceeding the Fifth Circuit Court of Appeals, without even giving written reasons, reached a conclusion *diametrically opposed* to its decision in *Frontero,* and also *diametrically opposed* to its recent decision in *Lockett v. Henderson,* __ F.2d __ (1973), which case is presently pending in this court under docket number 73-5280, on Petition For Writ Of Certiorari filed by Raymond Lockett. Moreover, Louisiana's interpretation of *Boykin* finds support in several other federal circuits. See, *e.g., Stinson v. Turner,* 473 F.2d 913 (10th Cir. 1973); *Wade v. Coiner,* 468 F.2d 1059 (4th Cir. 1972).

As the Louisiana trial court record in the present proceeding shows, at the time Frank Recasner pleaded guilty Judge Braniff addressed the accused by name, referred to the seriousness of the crimes to which

Recasner wished to plead guilty, reminded the accused that by pleading guilty he would not receive a trial with its incidental right to an appeal therefrom, and made sure that Recasner's plea was not the result of promises, threats, or coercion. In other words, Judge Braniff did not accept Recasner's plea of guilty without first addressing the accused personally and determining that the plea was being made voluntarily and with an understanding of the nature of the charge and the consequences of the plea. In the respectful belief of the State of Louisiana, *Boykin v. Alabama* was fully satisfied.

In June of 1969 Frank Recasner was very eager to be allowed to plead guilty to these three violent crimes and receive only a thirty-year sentence (The third robber, Woodfox, went to trial and was given a fifty-year sentence.). Now that this plea of guilty has been set aside by the lower federal courts, Recasner will doubtless want to go to trial, because by June of 1974 more than five years will have elapsed since the commission of the armed robbery of Louie's Green Room, and it will be difficult, if not impossible, for the State of Louisiana to prove Recasner's guilt.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to issue a Writ of Certiorari to the Fifth Circuit Court of Appeals in the instant proceeding, and, after a hearing, to reverse the judgments of the Fifth Circuit Court of Appeals and of the United States Dis-

trict Court granting Frank Recasner's Petition For Writ Of Habeas Corpus.

William J. Guste, Jr.,
Attorney General of
Louisiana

Leroy A. Hartley,
Special Counsel
to the Attorney General
of Louisiana

Jim Garrison,
District Attorney for the
Parish of Orleans

Louise Korns,
Assistant District Attorney for
the Parish of Orleans

Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana, 70119
Telephone: (504) 822-2414

CERTIFICATE

I certify that copies of this Brief have been mailed to:

John C. Ciolino, Esq.
234 Loyola Ave., Suite 601
New Orleans, La. 70112
Attorney for Frank Recasner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2527
Summary Calendar*

FRANK RECASNER,
Petitioner-Appellee,

versus

C. MURRAY HENDERSON,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 19, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See *Boykin v. Alabama*, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

[2]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FRANK RECASNER

versus C.A. No. 73-724
Section "D"

C. MURRAY HENDERSON

ORDER

The Court having received and carefully considered the recommendations of United States Magistrate Harry Lee, to whom this cause was referred for recommendations and report, adopts the report and recommendations of the Magistrate, accordingly,

IT IS ORDERED that the convictions and sentences of petitioner, Frank Recasner, obtained in Case No. 208-140, Section B, and Case No. 208-235, Section B, Criminal District Court, Parish of Orleans, be and they are hereby VACATED.

IT IS FURTHER ORDERED that petitioner be allowed by the State of Louisiana to plead anew within thirty (30) days, failing which the petitioner shall be discharged from the custody of the respondent, C. Murray Henderson, Warden, Louisiana State Penitentiary.

New Orleans, Louisiana, this 21st day of May, 1973.

/s/ EDWARD J. BOYLE, SR.
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FRANK RECASNER

versus C.A. No. 73-724
Section "D"

C. MURRAY HENDERSON

Petitioner, Frank Recasner, filed a petition for writ of habeas corpus here on March 22, 1973. In his petition he alleges, and the State Court records reflect, that he is serving three concurrent thirty-year sentences in the Louisiana State Penitentiary as the result of pleading guilty to three counts of armed robbery (two counts in No. 208-140 and one count in No. 208-235) on June 18, 1969.

Petitioner attacks his conviction here on the following grounds:

1) He was not advised of his right to appeal.

2) Was not advised of constitutional rights.

The petition filed in the Criminal District Court was denied without a hearing on November 21, 1972, Judge Braniff being of the opinion that the Court complied with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969).

On March 1, 1973, the Louisiana Supreme Court denied the writ, with Justice Barham being of the opinion that the writ must be granted because the Trial Court did not comply with *Boykin v. Alabama*. Justices Dixon and Calogero dissented from the refusal to grant the writ.

Since the attack is based on constitutional grounds as envisioned by 28 U.S.C. 2254(a) and since petitioner has exhausted his available state court remedies, 28 U.S.C. 2254(b), the petition is properly before this Court.

In accordance with the Court's order of April 24, 1973, an evidentiary hearing was held before me on May 16, 1973.

PRESENT:
Petitioner, Frank Recasner;
JOHN C. CIOLINO, Esq., for the petitioner;
RUSSELL J. SCHONEKAS, Esq., for Honorable Jim Garrison, District Attorney, Parish of Orleans; and
C. THOMAS PORTEOUS, JR., Esq., for Honorable William Guste, Attorney General, State of Louisiana, representing respondent, C. Murray Henderson.

At the hearing, no witnesses were called, counsel for the petitioner and counsel for the respondent submitting the matter on the record.

I — Petitioner Was Not Advised Of His Right to Appeal

The Transcript of the Court proceedings in regard to Frank Recasner's plea and sentencing in No. 208-140 and 208-235, Section B of the Criminal District Court for the Parish of Orleans, held on June 18, 1969, before the Honorable Matthew S. Braniff, clearly shows that the Court advised the defendant that by pleading guilty he waived his right to an appeal.

Accordingly, I recommend the petition be dismissed on the grounds that petitioner was not advised of his right to appeal.

II — Petitioner Was Not Advised of His Constitutional Rights in Regards to Boykin v. Alabama

In *Boykin v. State of Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), the Supreme Court held:

> ".... The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and un-

derstandingly rejected the offer. Anything less is not waiver.'

[4] We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction.[4] Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934.

[5] Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 280 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record.[5]

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought,[6] (Garner v. Louisiana, 368 U.S. 157, 173, 82 S.Ct. 248, 256, 7 L.Ed.2d 207; Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.[7]"

A review of the transcript of the guilty pleas entered on June 18, 1969, (copy attached), indicates that petitioner waived his right to a trial. However, the transcript does not show that petitioner waived his right to a trial by jury, the right to face his accusers or the right to remain silent. A waiver of these three important Federal rights cannot be presumed from a silent record.

Petitioner not having waived his constitutional rights to a trial by jury, the right to invoke the Fifth Amendment and the right to confront his accusers, did not voluntarily and understandingly enter his pleas of guilty to armed robbery and when the Trial Court accepted these pleas, petitioner was denied due process of law.

RECOMMENDATIONS

I recommend that the petition be dismissed [sic] on the grounds that petitioner was not advised of his right to appeal.

Since the transcript of the guilty pleas does not show that petitioner was advised of his right to a trial by jury, the right to remain silent, and the right to face his accusers, and further, since the State failed at the evidentiary hearing held by this Court on May 16, 1973, to show that petitioner was aware that by pleading guilty he waived his right to a trial by jury, the right to face his accusers and the right to remain silent, I recommend that the relief sought in the petition for writ of habeas corpus be granted.

I recommend that petitioner's conviction and sentence be vacated and the State allowed thirty days in which to allow petitioner to plead anew. If the State fails to allow petitioner to plead anew within thirty days, I further recommend he be discharged from custody.

RESPECTFULLY
SUBMITTED,
/s/ HARRY LEE
HARRY LEE
United States Magistrate